United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1329 OF 2005
GOPAL SRI RAM FCJ, AHMAD MAAROP AND KANG HWEE GEE JJCA
3 AUGUST 2009

Land Law — Lien — Lien holder's caveat — Third party charge — Whether registered proprietor of land may create lien over his title in favour of third party borrower — National Land Code s 281

UJA Sdn Bhd, the registered proprietor of a piece of land, deposited the title to its land with United Overseas Bank as security for a loan granted to Union Plastics Sdn Bhd. The bank entered a lien holder's caveat against the title to the land. Union Plastics defaulted in repaying the loan and the bank applied under s 281(2) of the National Land Code for an order for sale. The High Court struck out the bank's summons on the ground that a lien under s 281 could be created by a registered proprietor of land, only when he or she is also the borrower. Hence this appeal by the bank.

Held, allowing the appeal:

Section 281 is not limited to the creation of a security by way of a lien on title only for the benefit of a registered proprietor. It extends to third party borrowers as well (see para 9).

[Bahasa Malaysia summary

UJA Sdn Bhd, pemilik berdaftar sebidang tanah, telah mendepositkan geran tanahnya dengan United Overseas Bank sebagai cagaran bagi satu pinjaman yang diberikan kepada Union Plastics Sdn Bhd. Bank tersebut telah memasukkan kaveat pemegang lien terhadap tanah tersebut. Union Plastics mungkir dalam pembayaran balik pinjaman dan bank tersebut telah memohon di bawah s 281(2) Kanun Tanah Negara untuk satu perintah penjualan. Mahkamah Tinggi telah membatalkan saman bank tersebut atas alasan bahawa sesuatu lien di bawah s 281 boleh diwujudkan oleh seorang pemilik berdaftar tanah, hanya apabila dia juga adalah peminjam. Oleh itu pihak bank merayu.

Diputuskan, membenarkan rayuan:

Seksyen 281 tidak terbatas untuk perwujudan satu cagaran dengan cara sesuatu lien hanya untuk manfaat pemilik berdaftar. Ianya juga dilanjutkan kepada peminjam-peminjam pihak ketiga (lihat perenggan 9).]

Notes

For cases on lien generally, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3148–3177.

Cases referred to

Brandling v Barrington (1827) 108 ER 523, KB (refd)

Hong Leong Finance Bhd v Staghorn Sdn Bhd [2005] 5 MLJ 101; [2005] 2 CLJ 1, CA (refd)

NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)

Pepper v Hart [1993] 1 All ER 42, HL (refd)

Vickers, Sons & Maxim Ltd v Evans [1910] AC 444, HL (refd)

Legislation referred to

National Land Code s 281, 281(2)

Appeal from: Originating Summons No S3–24–2162 of 2004 (High Court, Kuala Lumpur)

SK Sivam (PG Lim & Co) for the appellant.

Paul Kwong (Lau Man Yee with him) (Azman Davidson & Co) for the respondent.

Gopal Sri Ram FCJ:

[1] This case raises an interesting point. It is whether the registered proprietor of land may create a lien over his or her title in favour of a third party borrower. It turns on the construction to be placed on s 281 of the National Land Code. That section reads:

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(1) Any proprietor or lessee for the time being may deposit with any other person or body as security for a loan, his issue document of title or, as the case may be, duplicate lease, and that person or body:

(a) may thereupon apply under Chapter 1 of Part 19 for the entry of a lien-holder's caveat; and

A (b) shall, upon the entry of such caveat, become entitled to a lien over the land or lease.

(2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the court for, and obtain forthwith, an order for the sale of the land or lease.

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I will state my views on how the section is to be read after reciting the facts.

[2] UJA Sdn Bhd is the registered proprietor of a piece of land. A company called Union Plastics Sdn Bhd wanted to borrow money from United C Overseas Bank. UJA deposited the title to its land with the bank as security for the loan. The bank entered a lien holder's caveat against the title to the land in question. It lent money to Union Plastics. It was quite a lot of money — RM6.2m. Union Plastics defaulted in making repayment of the loan. So the bank acted under s 281(2) and moved for an order for sale. The High D Court struck out the bank's summons on the ground that a lien under s 281 could be created by a registered proprietor of land when and only when he or she is also the borrower. In other words, A cannot create a lien over his title in favour of a lender to secure a loan to B. This view was based on an interpretation of the judgment of this court in *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [2005] 5 MLJ 101; [2005] 2 CLJ 1 where this court said: E

> Thus it is material in the creation of a lien holder's caveat under s 281 of the NLC to have the registered proprietor to deposit the document of title to the lender for it is the registered proprietor who intends to surrender his rights to the lender to F deal with the said land in the event of default in repayment of the loan which he obtained from the lender. As a borrower, no other person can substitute the registered proprietor in performing this task of depositing the document of title with the lender for the creation of this statutory instrument. To allow this would defeat the concept of the right of the registered proprietor to deal with his own land. Section 281 of the NLC is intended for a registered proprietor to raise money G on loan, speedily, by depositing the document of title registered in his name with the lender as compared with the more complex process of registering a legal charge over the land. But as the law demands, it is only available to a registered proprietor who borrows money and deposits his title with the lender. It does not extend to a beneficial owner who is yet to become a registered proprietor. Since this facility is H only available to the registered proprietor, in the event of default in repayment of the loan, judgment must be obtained against the registered proprietor, as borrower. The wordings in s 281(2) of the NLC of a 'holder of any lien has obtained judgment for the amount due to him' is clear to this effect for there can be no one else other than the registered proprietor who is the borrower.

I

[3] It must be said in fairness to the learned judge that at first blush the passage above quoted appears to convey the meaning as understood by him. However, a more careful reading reveals that what this court was saying was that a lien cannot be created without there being in existence an issue

document capable of being physically deposited. Hence the observation 'It (that is to say, s 281) does not extend to a beneficial owner who is yet to become a registered proprietor'.

[4] To complete the narrative, after the bank's application was struck out, UJA moved the High Court for an order directing the removal of the bank's lien holder's caveat and for the delivery up of the issue document of title. By this time, the learned judge had realised the true purport of the passage in the judgment of this court in the *Staghorn* case. He therefore dismissed UJA's application and with the frankness and honesty of purpose that has come to be associated with this learned judge, he accepted that his earlier view was probably wrong. The bank appealed against the striking out of its summons while UJA appealed against the dismissal of its summons. When the two appeals, the bank's and UJA's were called on, we decided to hear argument on the former. Having formed the view that the bank's appeal prima facie had merit we stopped its counsel from arguing its appeal and called on counsel for UJA to argue why the bank's appeal should not be allowed.

[5] It was submitted by learned counsel for UJA that s 281 should be read in such a way as to limit it to registered proprietors. He said that the words 'for himself' should be read into the first subsection between the phrase 'as security for a loan' and the phrase 'his issue document of title'. In this way the court would be giving effect to the true intention of Parliament which is to restrict this form of security transaction to registered proprietors only.

[6] With respect I am unable to agree. It is true that courts have sometimes to read words into provisions in an Act of Parliament to prevent an absurdity from resulting. But where the language employed is clear and unambiguous, it is not the function of the court to re-write the statute in a way in which it considers reasonable. As Seah SCJ said in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39:

> It must always be borne in mind that we are judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature (see Lord Chelmsford in *R v Hughes* (1866) LR 1 PC 81 at p 91 and Lord Macnaghten in *Vacher & Sons v London Society of Compositors* [1913] AC 107).

A **[7]** In *Vickers, Sons & Maxim Ltd v Evans* [1910] AC 444, Lord Loreburn LC said (at p 445):

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; … The appellant's contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

[8] There is only one rider I would add to the views expressed in the above quoted cases. If you look at some of the judgments in cases having to do with statutory interpretation, you may find references to the phrase 'rules of construction' or their equipollent. The truth of the matter is that there are no 'rules of construction'. What exist are certain broad guidelines for the interpretation of written law that the courts have from time to time established for themselves. Some of these are discarded in the passage of time whilst others rise to take their place. For example, at one point in time there was something called 'equitable rule of construction'. According to the third edition of *Crawford's Statutory Construction* which is the leading work on the subject:

> by virtue of this doctrine, the letter of the law might be disregarded and its provisions extended to cases which were within the same mischief which the law undertook to remedy, even though they were not expressly included, or cases might be excepted from the statute, although covered by its terms, where they were not fairly included, on considerations of justice and reason.

However, according to Maxwell on the *Interpretation of Statutes* (12th Ed) at p 237:

> … equity in the interpretation of a statute would not be tolerated today and it may be now considered altogether discarded in the construction of modern statutes.

And it is clear that by 1827, the so called 'equitable rule of construction' had been discarded. For we see Lord Tenterden CJ saying in *Brandling v Barrington* (1827) 108 ER 523:

> … there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them.

By the same token, the literal rule of interpretation which held the field for a considerable length of time has given way to the purposive approach to construction. As Lord Griffiths said in *Pepper v Hart* [1993] 1 All ER 42:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

The illustrations referred to merely seek to reinforce the point I make: that there are no 'rules of construction' but mere guides to statutory interpretation which at the end of the day assist the court in doing justice according to the intention of Parliament as expressed in its Act.

[9] Returning to the mainstream, it is in my considered judgment crystal clear that s 281 is not limited to the creation of a security by way of a lien on title only for the benefit of a registered proprietor. It extends to third party borrowers as well.

[10] For the reasons already given, the bank's appeal was allowed and UJA's appeal was dismissed. The usual orders consequent upon these disposals were made.

[11] My learned brothers Ahmad bin Hj Maarop and Kang Hwee Kee JJCA have seen this judgment in draft and have expressed their agreement with it.

Appellant's appeal allowed and respondent's appeal dismissed.

Reported by Kanesh Sundrum